

(b)(6)



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

DATE: **FEB 27 2013**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

203(b)(2)(A)
203(b)(2)

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter for further action and consideration.

The petitioner seeks classification of the beneficiary as an "alien of exceptional ability," pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner further asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II. The director determined that "the totality of the evidence" did "not sufficiently demonstrate that the beneficiary's expertise is above that ordinarily encountered in the field." The director also determined that "the evidence submitted does not persuasively show that the beneficiary has widespread national recognition for his work or international acclaim in the field of fine watch repair and refinishing in order to establish eligibility as an alien of exceptional ability."

I. LAW

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

II. ELIGIBILITY FOR CLASSIFICATION PURSUANT TO SECTION 203(b)(2) OF THE ACT

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

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(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. See *Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates “a degree of expertise significantly above that ordinarily encountered.” 8 C.F.R. § 204.5(k)(2); see also *Kazarian*, 596 F.3d at 1119-20. Only aliens whose achievements have garnered “a degree of expertise significantly above that ordinarily encountered” are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); see also *Kazarian*, 596 F.3d at 119-22.

While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court’s reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

The director found that the submitted evidence satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (F). The AAO affirms the director’s finding for these two criteria. The director also found that the submitted evidence did not satisfy the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (E) and that no evidence was submitted to satisfy the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C).

Regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the director stated that “the beneficiary has earned an average salary as a watch repair and refinishing specialist. It does not show that the beneficiary has earned a salary in the top highest ten (10) percent salary level in the field.” The AAO withdraws the director’s finding for this criterion. As asserted by counsel on appeal, “[n]owhere in the regulation is [it] indicated that a salary must be in the top ten percentile of salary level in order to establish that the beneficiary has commanded a salary, or other remuneration for services which demonstrates exceptional ability.”

In response to the director's request for evidence, the petitioner submitted documentary evidence that the beneficiary's earned wages for 2011 were significantly higher than the U.S. Department of Labor (DOL) level 4 prevailing wage for the referenced position. The petitioner has demonstrated that the beneficiary meets the plain language requirements of this regulatory criterion.

Regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the AAO notes that the director, as asserted by counsel on appeal, incorrectly applied the "extraordinary ability" classification. The exceptional ability classification requires "evidence of membership in professional associations." There is no requirement "that the association require[] outstanding achievements of their members" or that "membership eligibility [] [be] judged by [] recognized national or international experts in their field."

Regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), the AAO notes that, although the record lacks documentary evidence to support the claim, the beneficiary's resume indicates that he received an associate degree in [REDACTED] in Paris, France.

As the petitioner submitted documentary evidence to satisfy at least three of the required categories of evidence, the AAO will next consider all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary "possesses a degree of expertise significantly above that normally encountered." 8 C.F.R. § 204.5(k)(2). *See also Kazarian*, 596 F.3d at 1119-20.

As stated by the director in his denial, "the furnished testimonial letters indicate that the beneficiary is an expert craftsman in the field of fine watch repair." The beneficiary has more than twenty years of experience in the field, commands a high salary and has been recognized for his exceptional skills by international watchmakers. [REDACTED] confirms that their company, which manufactures watches valued from \$20,000 to more than \$500,000, has authorized the beneficiary as one of less than ten watchmakers in the world to service their most complicated models. The AAO therefore finds that the beneficiary "possesses a degree of expertise significantly above that normally encountered."

III. SCHEDULE A GROUP II DESIGNATION

In order to establish eligibility for Schedule A Group II designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor*. This petition seeks to classify the beneficiary as an alien with exceptional ability in the arts. 20 C.F.R. § 656.15(d)(1) provides:

An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

In addition, the same provision outlines seven criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. The director found "that the beneficiary meets the labor certification requirements" and "that the position requires exceptional ability." The director also found that "the evidence submitted does not persuasively show that the beneficiary has widespread national recognition for his work or international acclaim in the field."

Although counsel specifically addressed the criteria at 20 C.F.R. § 656.15(d)(1)(i)-(vii) in the original petition, the director did not address any of the specific criteria in either the request for evidence or in his decision. Thus, the director's decision failed to adequately consider the evidence submitted for the regulatory criteria and discuss why that evidence was deficient. As a result, the petitioner was unable to file a meaningful appeal addressing those deficiencies.

In light of the above, the matter is remanded to the director for reconsideration as to whether the beneficiary qualifies for a Schedule A labor certification under Group II. Any adverse decision must address all of the evidence as it relates to all of the regulatory criteria claimed.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.